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No. 71-971

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

FISONS LIMITED AND FISONS PHARMACEUTICALS, LTD., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A21) is not yet reported. The order of the district court (Pet. App. A1-A2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1972. The petition for a writ of certiorari was filed January 31, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether on the facts of this case the court of appeals correctly held that under the Illinois long-arm statute the district court had personal jurisdiction over two non-resident corporations named as defendants in a government antitrust suit.

STATUTES AND RULES INVOLVED

F.R. Civ. P. 4(e) provides in pertinent part:

> (e) Same: Service Upon a Party not Inhabitant of or Found Within State.
>
> Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

Section 17(1)(a), (1)(b), and (3) of the Illinois Civil Practice Act, Rev. Stat. 1955, Chap. 110, par. 17(1)(a), (1)(b), and (3), provides:

> (1) Any person whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and if an individual, his personal representative, to the jurisdiction of the courts of this State as to any such acts:
>
> (a) The transaction of any business within this State;
>
> (b) The commission of a tortious act within this State;
>
> * * *
>
> (3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this Section.

STATEMENT

On July 29, 1969, the United States filed a civil complaint (Pet. App. A39-A48) charging two British corporations, petitioners Fisons Limited and its subsidiary, Fisons Pharmaceuticals, Ltd., with violating Section 1 of the Sherman Act by entering into restrictive licensing agreements for the manufacture, distribution and sale of iron dextran, a patented iron supplement,[1] with three American firms, Armour and

[1] Iron dextran, upon which United States Patent No. 2,820,740 was issued to another Fisons Limited subsidiary in 1958, is used in the treatment of anemia and other iron deficiency conditions in humans and certain livestock, particularly hogs.

Company, Colgate-Palmolive Co., and American Home Products Corp. The complaint alleged that trade in iron dextran has been unreasonably restrained since 1956 as a result of the license agreements, which allocate markets, restrict sales in bulk form, condition the grant of additional licenses, and control the validity, use and transfer of all license trademarks. The complaint named each of the five corporations as a defendant. Jurisdiction over the petitioner corporations was asserted pursuant to F.R. Civ. P. 4(e) and Section 17(1)(a) of the Illinois Civil Practice Act, Ill. Rev. Stat. 1955, Chap. 110, par. 17(1)(a)—the Illinois long-arm statute.

Appearing specially to contest the *in personam* jurisdiction of the district court, petitioners filed a motion to quash service of process and to dismiss the complaint.[2] Extensive discovery directed to the jurisdictional issue ensued. On August 6, 1971, on the basis of various documents, depositions and affidavits, and after full briefing and argument, the district court denied the motions in a brief order. At petitioners' request, the district court revised its order (Pet. App. A1-A2) to include a certification for an interlocutory appeal to the court of appeals pursuant to the Interlocutory Appeals Act, 28 U.S.C. 1292(b).

On petitioners' appeal, the government contended that the direct appeal provisions of the Expediting Act (15 U.S.C. 29) foreclosed interlocutory appeals

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[2] The three American defendants filed separate answers in which they admitted, *inter alia*, the jurisdiction of the district court.

to the courts of appeals in civil antitrust suits brought by the United States. The government also contended that the district court had correctly ruled that it had jurisdiction under the Illinois long-arm statute.

The court of appeals affirmed (A3-A21). The court first held that it had jurisdiction under the Interlocutory Appeals Act, and that the question certified by the district court was appropriate for interlocutory review.

As to the merits of the appeal, the court held that "the record discloses a sufficient relationship between [the Fisons firms] and the transaction of business in Illinois to subject them to federal jurisdiction in the court below" (Pet. App. A18). It found that the petitioners' patent license agreements with the American companies contained provisions that controlled aspects of the licensees' business activities and created a continuing relationship, including a significant measure of control over such activities in Illinois, sufficient to sustain jurisdiction. The court further held, under *Nelson* v. *Miller*, 11 Ill. 2d 378, 143 N.E. 2d 672, 679, that Section 16 and Section 17, the long-arm provision, "of the Illinois Civil Practice Act reflected a conscious purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due process clause" (Pet. App. A17). The court therefore concluded that the scope of the Illinois statute is measured by federal standards and that *Grobark* v. *Addo Machine Co.*, 16 Ill. 2d 426, 158 N.E. 2d 73, was not binding on a federal court because there the state court determined the reach of the long-arm statute by reference to limitations in federal law. Moreover, *Grobark*

had been undermined by more recent decisions and was, in any event, factually distinguishable because the contractual elements of control dispositive here were not present in that case.

ARGUMENT

With respect to the jurisdiction of the courts of appeals over interlocutory appeals under 28 U.S.C. 1292(b) in government antitrust cases subject to the Expediting Act, the decision below conflicts with *Farbenfabriken Bayer, A. G.* v. *United States*, 1968 Trade Cases ¶72,570 (C.A.D.C.), certiorari denied, 393 U.S. 959; and *Tidewater Oil Co.* v. *United States*, C.A. 9, Misc. No. 9751, certiorari denied, 404 U.S. 941, motion for leave to file out of time petition for rehearing pending, No. 71-366, O.T. 1971. This issue, however, is not presented by the petition because the court of appeals decided it in petitioners' favor. Although the government contested the court of appeals' jurisdiction, it did not petition independently on this issue because it was the successful party on the merits. The issue that is presented by the petition—the application of the Illinois long-arm statute to the facts of this case—is not of general importance and does not warrant review by this Court. Accordingly, the petition for a writ of certiorari should be denied.[4]

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[3] *Koplin* v. *Thomas, Haab and Botts*, 73 Ill. App. 2d 242, 219 N.E. 2d 646 (1st Dist.); *Ziegler* v. *Hodges*, 80 Ill. App 2d 210, 224 N.E. 2d 12 (2d Dist.); see *O'Hare International Bank* v. *Hampton*, 437 F.2d 1173, 1176 (C.A. 7); Cf. *Gray* v. *American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E. 2d 761.

[4] If the petition is granted, however, the government will contend

1. Petitioners contend that the decision of the court of appeals, upholding *in personam* federal jurisdiction over petitioners pursuant to the Illinois long-arm statute, conflicts with "the majority opinion of the latest decision of the Illinois Supreme Court" (Pet. 5-6) [5] in *Grobark* v. *Addo Machine Co.*, 16 Ill. 2d 426, 158 N.E. 2d 73 (1959). The reach of Section 17(1)(a) of the Illinois Civil Practice Act, the long-arm provision involved here, had previously been defined by the Illinois Supreme Court in *Nelson* v. *Miller*, 11 Ill. 2d 378, 143 N.E. 2d 673: "Sections 16 [6] and 17 of the Civil Practice Act reflect a conscious purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due-process clause." 11 Ill. 2d at 389, 143 N.E. 2d at 679. Applying the doctrine announced in *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316,

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that the court of appeals should not have reached the merits of the appeal before it, but should have dismissed for lack of jurisdiction on the ground that the Expediting Act forecloses interlocutory appeals to the courts of appeal under 28 U.S.C. 1292(b). Moreover, on January 21, 1972, Tidewater Oil Company filed a petition in *Tidewater Oil Co.* v. *United States*, *supra*, asking rehearing on the ground of the conflict between the circuits' application of the Interlocutory Appeals Act to civil antitrust cases brought by the United States (Petition for Rehearing, No. 71-366, October Term, 1971). As stated in the Response of the United States to the Petition for Rehearing, filed simultaneously with the present Brief in Opposition, by granting the petition for a writ of certiorari in *Tidewater*, this Court will have an appropriate vehicle by which to resolve the conflict. Because the petition in this case does not present that issue, however, it may be considered without reference to the *Tidewater* case.

[5] As the court of appeals noted, petitioners "raise no question about the form of the process, the manner in which it was served, the adequacy of notice, or venue" (Pet. App. A15).

[6] Section 16 contains the provisions for service of process.

the Illinois Supreme Court there held that the defendant had "certain minimum contacts" with the forum sufficient to subject it to the personal jurisdiction of the state court.

After the state court's decision in *Nelson* v. *Miller*, *supra*, this Court decided two cases involving the requirements of due process in the exercise of *in personam* jurisdiction over non-resident defendants. *McGee* v. *International Life Insurance Co.*, 355 U.S. 220; *Hanson* v. *Denckla*, 357 U.S. 235. Thereafter, in *Grobark*, *supra*, the Illinois Supreme Court held that, consistent with the federal due process principles announced by this Court, personal jurisdiction could not be asserted over a non-resident who "did not at any time own any interest in any corporation, partnership, or individual distributing its products in Illinois, and did not at any time have the right to exercise any control over the distributors; the relationship between defendant and distributor being that of seller and purchaser" (Pet. App. A33). The majority in *Grobark* did not question its earlier holding in *Nelson* v. *Miller* that Section 17 "reflect[s] a conscious purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due process clause" (*id.* at A26). Rather, expressly relying upon the subsequent decision of this Court in *Hanson*, the court concluded that in the circumstances the defendant had not subjected itself to the jurisdiction of the Illinois courts (*id.* at A32).

The majority opinion in *Grobark* thus rested not on

that court's interpretation of the state long-arm statute, but on the court's view of federal constitutional requirements. There is no basis for petitioners' assertion that the decision of the court of appeals in this case constitutes an improper redrafting of state law as interpreted by the state's highest court. To the contrary, the *Grobark* majority clearly viewed federal constitutional law as determinative, and, as the court of appeals properly held, a federal court is "not bound by a state court's answer to a federal question" (Pet. App. A17). See *Standard Oil Company of California* v. *Johnson*, 316 U.S. 481, 483.

As in *Grobark*, here the court of appeals applied the rule of *Hanson* v. *Denckla*, *supra*, to the facts before it. Thus, it concluded that petitioners had "purposefully availed themselves of the benefits and protection of local law and commerce, and that their contracts have significantly affected the way in which business is conducted in Illinois" (Pet. App. A18).

2. In any event, the facts of this case differ significantly from those in *Grobark*, as the court of appeals noted. On the extensive record here, the court below found that petitioners' control over their Illinois li-

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[7] See *Gray* v. *American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E. 2d 761. Although *Gray* arose under Section 17(1)(b) of the Illinois Civil Practice Act, the so-called "tort" provision, subsequent state court decisions have held that no legal significance attached to the distinction between "transacting business" and "tort" cases for purposes of personal jurisdiction. See, *Ziegler* v. *Hodges*, 80 Ill. App. 2d 210, 215, 224 N.E. 2d 12, 14 (2d Dist.); *Koplin* v. *Thomas, Haab & Botts*, 73 Ill. App. 2d 242, 253-254; 219 N.E. 2d 646, 651-652 (1st Dist.).

censees constituted far more than the transitory relationship of seller and buyer found to exist in *Grobark* (Pet. App. A20-A21):

> The patent license agreement (and the supply agreement which incorporates the restrictions of the license agreement) contains provisions which control aspects of the business activities of the American licensee. Thus, some, if not all, of the principal's economic control over an agent is continuously exercised by [petitioners] over their American representatives. Their continuing relationship, including a significant measure of control over business activities within Illinois, is in our view sufficient to sustain jurisdiction.* * *

3. Petitioners also argue that the court of appeals upheld personal jurisdiction under Illinois law based "on what it considers to be a practical expediency of federal law enforcement" (Pet. at 2, 6). Apparently, petitioners refer to the court's statement that "[i]t is possible that the real issue is whether it is fairer to make appellants come to Chicago to defend their use of an American patent than to allow them a measure of immunity from attack under the Sherman Act" (Pet. App. A19-A20, n. 27). This statement reflects the court's consideration of whether, in the circumstances, maintenance of the government's antitrust suit would offend "traditional notions of fair play and substantial justice," which traditionally have been deemed to be essential elements of due process. *Milliken* v. *Meyer*, 311 U.S. 457, 463; *International Shoe Company* v. *Washington*, *supra*, 326 U.S. at 316.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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